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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

NO. 48

CARL H. KOTHE, Trustee,

APPELLEE, PETITIONER HEREIN,

v.

R. C. TAYLOR TRUST,

APPELLANT, RESPONDENT HEREIN.

IN THE MATTER OF

HERBERT TURKEL, Bankrupt.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

GEORGE S. TAFT,
Attorney for Respondent.

T. HOVEY GAGE,
Of Counsel.

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Supplemental Brief for the Respondent.

1. The lease was a two year lease.

The dissenting opinion of the Circuit Court of Appeals states (Record, page 12) that in the Referee's certificate "Neither the date nor the term of the lease is stated. For those my brethren resort to the briefs." The *opinion* states (Record, page 9) "The term of the lease was short—two years." The petition for writ of certiorari states that the lease was "for the full term of two years." It is assumed, therefore, that notwithstanding the omission in the Referee's certificate to state the term of the lease, this Court will consider the question as though the Referee's certificate had stated that it was a two-year lease. The Court below and both counsel have so dealt with it.

2. The fact that it was a short term lease may be of importance.

The dissenting opinion states (Record, page 12)

> "Appellant's learned counsel frankly and correctly conceded at the argument that, if this claim is provable, a like claim under a lease

> for forty years, terminated by the lessee's bankruptcy at the end of one year, would be provable."

Whatever view respondent's counsel may have taken in argument in the Court below, the respondent does not now concede "that if this claim is provable, a like claim under a lease for forty years, terminated by the lessee's bankruptcy at the end of one year, would be provable." This being a two-year lease, it is submitted that it is unnecessary to discuss here whether a like claim under a long or longer term lease would be provable. That the term was short seems to have been an important fact in the opinion of the Court below. "The term of the lease was short—two years." The respondent now contends that it may not necessarily follow that because this claim is provable, "a like claim under a lease for forty years, terminated by the lessee's bankruptcy at the end of one year, would be provable." The only question now presented is whether the clause under consideration in a *two-year* lease is reasonable and gives the lessor a provable claim.

3. The concrete question in the case is whether the provision under consideration in this two-year lease is upon its face so unreasonable that it must have been intended as a penalty, and that a claim for damages of $5000 should be disallowed, that being a sum equal to the rent reserved for fifteen months of the lease, the "residue of the term."

When a lessor re-enters leased premises for breach of a covenant by the lessee, and terminates the lease, he has no further claim against the lessee, where the lease contains no stipulation for damages.

Gardiner v. Butler & Co., 245 U. S. 603.

Consequently, modern leases usually contain some stipulation. Some of the common provisions are enumerated in *Louis K. Liggett Co. v. Wilson, 224 Mass. 456, 459.* An illustration is found in the lease in *Filene's Sons Co. v. Weed, 245 U. S. 598.*

The purpose of such stipulations is to protect the lessor against the loss of the "benefit of his bargain."

(Such stipulations are of course unnecessary when there are responsible guarantors for the performance by the lessee of all of his covenants, a well known common requirement of lessors.)

Such stipulations, when reasonable, are enforceable against the lessee, and permit the lessor to share with the lessee's other creditors in the distribution of assets under receivership proceedings.

Filene's Sons Co. v. Weed, supra.

Under the bankruptcy law, the only claims provable are those in existence at the time of the filing of the petition.

30 Sts., chap. 541, §63.
Zavelo v. Reeves, 227 U. S. 625.

Where a lease provides that upon bankruptcy the lessor *may enter and terminate* the lease, with a further provision for damages in that event, the lessor has no provable claim, as the claim is not in existence at the filing of the petition.

Slocum v. Soliday, 183 Fed. 410.

Under the lease in the case at bar, bankruptcy terminated the lease, the claim for damages arose "forthwith" and was in existence at or before the filing of the petition in bankruptcy, and was not contingent. The claim was therefore provable, if it was a valid and enforceable claim against the lessee. (Cases cited in the Opinion of the Circuit Court of Appeals, Record, page 9.)

The Opinion states (Record, page 9):

> "It cannot be said that the amount of damages to be recovered is so largely in excess of any actual damage that the lessor may suffer that it must have been intended as a penalty and its recovery would be unconscionable."

The respondent contends that the authorities cited on pages 5 and 6 of its brief in opposition to the petition, and in the Opinion of the Circuit Court of Appeals (Record, page 10) support that conclusion. If the lessor is unable to relet the premises for any part of the "residue of the term" (in this case fifteen months) after the termination of the lease, or to make any valuable use of them, then the damages agreed upon would not *at all* exceed the actual damage. The actual damage cannot be known until the date of expiration of the term. How can it be said that the stipulation upon its face was intended as a penalty when the actual damage *may* equal the stipulated damage?

In the case of *Bedard v. Ransom, Inc., 241 Mass. 74*, cited on page 6 of Respondent's Brief in opposition to the petition, it is difficult to see how the actual damage could possibly have amounted to as much as the stipulated damage, and yet the contract was held to be enforceable.

It may be noted that "the residue of the term" might be much longer in a long term lease than in a two year lease, and that there would be a greater *probability* in such case that the vacant premises might prove of some value to the lessor. Whether a similar provision in a *long term* lease might be held unreasonable, is not here involved.

Respectfully submitted,

GEORGE S. TAFT,
Attorney for Respondent.

T. HOVEY GAGE,
Of Counsel.